

1  
2  
3  
4  
5  
6  
7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF OREGON  
9

10 THE EXPLORASTORE, LLC, )  
11 Plaintiff, ) No. 05-75-HU  
12 v. )  
13 CALIFORNIA SCIENCE CENTER ) FINDINGS AND RECOMMENDATION  
14 FOUNDATION, )  
15 Defendant. )  
16 \_\_\_\_\_ )

17 Leonard D. DuBoff  
18 Holly Helmuth Martin  
19 The DuBoff Law Group  
6665 S.W. Hampton Street, Suite 200  
Portland, Oregon 97223  
Attorneys for plaintiff

20 R. Joseph Trojan  
21 Trojan Law Offices  
22 9250 Wilshire Blvd., Suite 325  
Beverly Hills, California 90212  
23 E.J. Simmons  
621 S.W. Fifth Avenue, Suite 1300  
Portland, Oregon 97205  
Attorneys for defendant

24  
25 HUBEL, Magistrate Judge:

26 This is an action for trademark infringement, asserting claims  
27

1 for injunctive relief and damages, by plaintiff The Explorastore,  
2 LLC, an Oregon limited liability company (the ExploraStore),  
3 against defendant California Science Center Foundation (the  
4 Foundation), a California corporation with its principal place of  
5 business in Los Angeles, California. The matter before the court is  
6 the Foundation's motion to dismiss for lack of jurisdiction or,  
7 alternatively, to transfer venue to the United States District  
8 Court for the Central District of California.

9 The complaint alleges that as early as 1992, the ExploraStore  
10 has used the mark, "The Explorastore" in connection with a retail  
11 shop and Internet business, both of which feature science toys. The  
12 retail shop is located in Cannon Beach, Oregon, and regularly  
13 serves customers from California and throughout the United States;  
14 in addition, the ExploraStore advertises, markets and sells its  
15 products throughout the world by means of its Internet site.

16 The ExploraStore alleges that it obtained federal registration  
17 for the mark on April 15, 2003, and asserts that there have been  
18 "numerous instances of actual confusion" in which the ExploraStore  
19 received communications intended for the Foundation. The  
20 ExploraStore alleges that it wrote a "cease and desist" letter to  
21 the Foundation on April 26, 2004.

22 In support of its motion to dismiss, the Foundation proffers  
23 evidence that it is a California nonprofit organization with its  
24 principal place of business in Los Angeles, California. It is an  
25 auxiliary to the California Science Center (the Center), a legal  
26 entity of the State of California. The Foundation provides support  
27

1 for exhibits and educational programs of the Center.

2 According to the Declaration of Cynthia Pygin, chief financial  
3 officer of the Foundation, most of the Foundation's business  
4 activities are conducted within California. The Foundation is not  
5 registered to conduct business in Oregon and has no registered  
6 agents, employees or representatives located in Oregon; has never  
7 maintained an office or affiliated entity in Oregon; has never  
8 provided any services or paid taxes in Oregon; has no bank  
9 accounts, real or personal property in Oregon; has never been  
10 involved in any prior lawsuits in Oregon; and has never sent any of  
11 its personnel or principals to Oregon for business purposes.

12 Ms. Pygin states further that the Foundation has opened a  
13 store, called the ExploraStore, inside the Center, which sells  
14 scientific and educational gifts, toys, kits and materials to  
15 visitors, and that the Foundation operates a single-page  
16 informational Internet site for its ExploraStore, but does not  
17 solicit the sale of, or sell, any of its products by means of the  
18 Internet site. Ms. Pygin states that the Foundation has no  
19 established distribution channel to fulfill orders from Oregon and  
20 does not target residents of Oregon through its advertising.

### 21 Standards

22 The plaintiff bears the burden of establishing personal  
23 jurisdiction by a preponderance of the evidence. KVOS Inc. v.  
24 Assoc. Press, 299 U.S. 269, 278 (1936); Ballard v. Savage, 65 F.3d  
25 1495, 1498 (9<sup>th</sup> Cir. 1995). A two-part showing is required: (1) the  
26 forum state must have an applicable long-arm statute; and (2) the

1 assertion of jurisdiction must comport with the constitutional  
2 requirements of due process. Fireman's Fund Ins. Co. v. National  
3 Bank of Cooperatives, 103 F.3d 888, 893 (9<sup>th</sup> Cir. 1996). Oregon's  
4 long arm statute, Oregon Rule of Civil Procedure 4L, extends  
5 personal jurisdiction to the extent permitted by federal due  
6 process. Gray & Co. v. Firstenberg Mach. Co., 913 F.2d 758, 760 (9<sup>th</sup>  
7 Cir. 1990). "Thus, the analysis collapses into a single framework  
8 and the court proceeds under federal due process standards."  
9 Millennium Enterprises v. Millennium Music, LP, 33 F. Supp.2d 907,  
10 909 (D. Or. 1999).

11 When the district court receives only written submissions, and  
12 makes its jurisdictional decision on the basis of pleadings and  
13 affidavits, the plaintiff need only make a prima facie showing of  
14 jurisdiction to avoid the defendant's motion to dismiss. Omeluk v.  
15 Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 268 (9<sup>th</sup> Cir. 1995).  
16 In determining whether the plaintiff has met this burden,  
17 uncontroverted allegations in the complaint must be taken as true,  
18 and conflicts between the facts contained in the parties'  
19 affidavits must be resolved in plaintiff's favor. Dole Food Co. v.  
20 Watts, 303 F.3d 1104, 1107 (9<sup>th</sup> Cir. 2002).

21 The ExploraStore concedes that the Foundation is not subject  
22 to general jurisdiction in Oregon, but asserts that the Foundation  
23 is subject to specific jurisdiction. To be subject to specific  
24 jurisdiction, 1) the nonresident defendant must purposefully direct  
25 its activities or consummate some transaction with the forum or a  
26 resident of the forum, or perform some act by which it purposefully

1 avails itself of the privilege of conducting activities in the  
2 forum, thereby invoking the benefits and protection of its laws; 2)  
3 the claim must be one that arises out of or relates to the  
4 defendant's forum-related activities; and 3) the exercise of  
5 jurisdiction must comport with fair play and substantial justice;  
6 i.e., it must be reasonable. Dole, 303 F.3d at 1111.

7 The purposeful direction or availment requirement for specific  
8 jurisdiction is analyzed in intentional tort cases under the  
9 "effects" test articulated by the Supreme Court in Calder v. Jones,  
10 465 U.S. 783 (1984). Calder "stands for the proposition that  
11 purposeful availment is satisfied even by a defendant 'whose only  
12 contact with the forum state is the purposeful direction of a  
13 foreign act having effect in the forum state.'" Dole, 303 F.3d at  
14 1111, quoting Haisten v. Grass Valley Med. Reimbursement Fund, 784  
15 F.2d 1392, 1397 (9<sup>th</sup> Cir. 1986); see also Bancroft & Masters, Inc.  
16 v. Augusta Nat'l, Inc., 223 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000) ("In  
17 Calder, the Supreme Court held that a foreign act that is both  
18 aimed at and has effect in the forum state satisfies the purposeful  
19 availment prong of the specific jurisdiction analysis.")

## 20 Discussion

### 21 1. Purposeful availment

22 The ExploraStore asserts that the purposeful availment element  
23 is satisfied because the Foundation's allegedly infringing conduct  
24 causes harm to the ExploraStore in Oregon, in the form of customer  
25 confusion. The ExploraStore has submitted a copy of an email sent  
26 to its InternetAndrea Klink, who states that she has "recently  
27

1 visited the Explorastore in L.A.," and asks for a color poster.

2       The Foundation moves to strike this evidence as hearsay, which  
3 it is. Even if the evidence were admissible, it would not suffice  
4 to satisfy the "effects" test of Calder. First, there is no  
5 evidence that the Foundation has intentionally engaged in conduct  
6 targeted at the ExploraStore in Oregon, or its customers. See  
7 Bancroft & Masters, 223 F.3d at 1087 ("express aiming requirement  
8 met when defendant is alleged to have engaged in wrongful conduct  
9 targeted at a plaintiff whom the defendant knows to be a resident  
10 of the forum state).

11       Second, there is no evidence that harm was caused to the  
12 ExploraStore by the Foundation's allegedly infringing conduct.  
13 There is no evidence that Ms. Klink intended to purchase an item or  
14 otherwise do business with the ExploraStore in Oregon. Her email  
15 makes it plain that her intention was to purchase a product from  
16 *the Foundation*, based on her contacts with the Foundation's  
17 ExploraStore in California. There is no evidence that the  
18 Foundation knew or should have known that a customer who had  
19 visited the ExploraStore in Los Angeles would mistake it for an  
20 unrelated store in Cannon Beach, Oregon, through the Oregon store's  
21 Internet site. And finally, any "harm" generated by Ms. Klink's  
22 confusion affected the Foundation, not the ExploraStore.

23       The ExploraStore also argues that the Foundation's continuing  
24 to use the ExploraStore mark after receiving the cease and desist  
25 letter constitutes an act aimed at the ExploraStore and causing it  
26 harm in Oregon. This argument is not persuasive. The fundamental  
27

1 requirement for personal jurisdiction is that the contacts which  
2 support jurisdiction must proximately result from actions by the  
3 defendant that create a substantial connection with the forum  
4 state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985);  
5 Glencore Grain v. Shivnath Rai Harnarain, 284 F.3d 1114, 1123 (9<sup>th</sup>  
6 Cir. 2002). The ExploraStore's own conduct cannot create contacts  
7 which support jurisdiction.<sup>1</sup>

8 The ExploraStore has presented no evidence that the Foundation  
9 knew of its existence before the commencement of this action, or  
10 that the Foundation has committed any intentional act expressly  
11 aimed at Oregon or at the ExploraStore, or that any significant  
12 amount of harm has occurred to the ExploraStore in Oregon as a  
13 result of the Foundation's conduct. The "effects" test of Calder is  
14 not satisfied here.

15 The ExploraStore argues further that the purposeful availment  
16 element is satisfied based on the Center's Internet site and  
17

---

18 <sup>1</sup>For this reason, the correspondence between the  
19 ExploraStore and the Foundation is also insufficient to show some  
20 measure of "purposeful availment." See Tech Heads, Inc. v.  
21 Desktop Service Center, Inc., 105 F. Supp.2d 1142, 1147 (D. Or.  
22 2000) (correspondence initiated by plaintiff does not subject  
23 defendant to jurisdiction; "[o]nly those contacts with the forum  
24 that were created by the defendant, rather than those  
25 manufactured by the unilateral acts of the plaintiff, should be  
26 considered for due process purposes.")

1 contacts with Oregon generated by the Internet site. In Millennium  
2 Enterprises, Inc. v. Millennium Music, LP, 33 F. Supp.2d 907 (D.  
3 Or. 1999) this court adopted a "sliding scale" analysis to  
4 determine whether an Internet site could support personal  
5 jurisdiction. Under this analysis, "the likelihood that personal  
6 jurisdiction can be constitutionally exercised is directly  
7 proportionate to the nature and quality of commercial activity that  
8 an entity conducts over the Internet." Id. at 1124. See also Tech  
9 Heads, 105 F. Supp.2d at 1149. At one end of the scale is a site  
10 which enables the defendant to conduct business over the Internet  
11 with residents of the forum, and the defendant does so; such sites  
12 support personal jurisdiction. At the opposite end of the scale are  
13 "passive" sites merely accessible to users in the forum state and  
14 elsewhere, which are generally insufficient to support personal  
15 jurisdiction. See, e.g., Cybersell, Inc. v. Cybersell, Inc., 130  
16 F.3d 414 (9<sup>th</sup> Cir. 1997) (defendant's Internet site contained only  
17 a telephone number and an invitation to communicate by email, and  
18 defendant had no additional contacts with forum residents; court  
19 held that "something more" was required, to show that the defendant  
20 directed his activity at the forum state). In the middle of the  
21 scale are the more problematic "interactive" Internet sites which  
22 allow a user to exchange information with the host computer.

23       According to the evidence proffered by the Foundation, the  
24 Center maintains an Internet site ([www.californiasciencecenter.org](http://www.californiasciencecenter.org))  
25 with several links, including "General Information," "Planning Your  
26 Visit," "News and Events," "Members and Supporters," "Event  
27



1 Services," "Employment/Volunteering," "Media Room," "About Us," and  
2 "Contact Us." Declaration of R. Joseph Trojan, Exhibit 5. One of  
3 the links is "ExploraStore." The ExploraStore link is a single page  
4 which describes the "theme worlds" into which the store is divided,  
5 each of which reflects "the many amazing exhibits at the California  
6 Science Center, so you can take all the learning and fun home with  
7 you." Id. The ExploraStore page does not advertise or display any  
8 of the store's products, and does not offer them for sale.

9 In Millennium, the court rejected plaintiff's description of  
10 defendant's Internet site as "active" because "such designation  
11 [is] intended for those businesses which conduct a significant  
12 portion of their business through ongoing Internet relationships;  
13 for example, by entering into contracts with residents of a foreign  
14 jurisdiction that involve the knowing and repeated transmission of  
15 computer files over the Internet." 33 F. Supp.2d at 920. In Tech  
16 Heads, the court found defendant's Internet site "highly  
17 interactive," and therefore sufficient to support personal  
18 jurisdiction, because defendant not only conducted most of its  
19 business over the site, advertising, selling products, and offering  
20 information, but also exchanged information with users and actively  
21 encouraged and solicited users through other means, such as  
22 national advertising and a toll-free telephone number. Id. at 1150.

23 In this case, the Internet site in question is not that of the  
24 defendant Foundation, but rather of the Center. Moreover, the  
25 Center's Internet site does not display, advertise, or offer to  
26 sell the merchandise of the ExploraStore in Los Angeles, and it is  
27

1 not possible to purchase the store's items online. There is no  
2 evidence of a single transaction between the Center's Internet site  
3 and Oregon users, and even if there were such a transaction, it  
4 could not involve the sale of the ExploraStore's merchandise,  
5 because the ExploraStore's merchandise cannot be purchased over the  
6 Internet site.

7 The ExploraStore argues that the Center's Internet site is  
8 interactive because users can exchange information and enter into  
9 a membership contract with the Center that includes a discount or  
10 gift certificate to the ExploraStore in California. However, the  
11 issue here is not business transactions between the Center, which  
12 is not a party, and users of its Internet site. I conclude,  
13 therefore, that the Center's Internet site, with its ExploraStore  
14 link, is insufficient to satisfy the "purposeful availment"  
15 requirement for personal jurisdiction over the Foundation.

16 \_\_\_\_2. Arising out of forum-related activities

17 The second requirement for specific personal jurisdiction is  
18 that the claim asserted arise out of the Foundation's forum-related  
19 activities. The test is whether the plaintiff "would not have been  
20 injured 'but for' the defendant's ... conduct directed toward  
21 [plaintiff]." Panavision Int'l, LP v. Toeppen, 141 F.3d 1316, 1322  
22 (9<sup>th</sup> Cir. 1998). For the reasons discussed, I find no evidence that  
23 the defendant has engaged in purposeful conduct directed at the  
24 plaintiff, or at Oregon; accordingly, I find no evidence that the  
25 ExploraStore has been injured "but for" such conduct.

26 \_\_\_\_3. Reasonableness

1 Because I find that the ExploraStore has failed to satisfy the  
2 first two elements required for specific jurisdiction, it is  
3 unnecessary to reach the issue of whether the exercise of  
4 jurisdiction would be reasonable.

5 **Conclusion**

6 I recommend that defendant's motion to dismiss (doc. # 13) be  
7 GRANTED, that the alternative motion to transfer venue be DENIED AS  
8 MOOT, and that this action be dismissed for lack of personal  
9 jurisdiction.

10 **Scheduling Order**

11 The above Findings and Recommendation will be referred to a  
12 United States District Judge for review. Objections, if any, are  
13 due May 11, 2005. If no objections are filed, review of the  
14 Findings and Recommendation will go under advisement on that date.  
15 If objections are filed, a response to the objections is due May  
16 25, 2005, and the review of the Findings and Recommendation will go  
17 under advisement on that date.

18  
19 Dated this 26<sup>th</sup> day of April, 2005.

20  
21 /s/ Dennis J. Hubel  
22 Dennis James Hubel  
23 United States Magistrate Judge  
24  
25  
26  
27